Supreme Court, U.S.
FILED
JAN 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-1101

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

BURBANK-GLENDALE-PASADENA AIRPORT AUTHORITY,

Petitioner,

vs.

KENNETH L. BAKER, et al.,

Respondents.

ON PETITION FOR WRIT
OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

RESPONDENTS' BRIEF IN OPPOSITION

JOHN J. SCHIMMENTI
COUNSEL OF RECORD

SCHIMMENTI, MULLINS & BERBERIAN

Suite 602
999 N. Sepulveda Blvd.
El Segundo, CA 90245
(213) 640-0392

Attorneys for Respondents,
KENNETH L. BAKER, et al.

57pp

QUESTIONS PRESENTED FOR REVIEW

1. Is continuing nuisance liability for airports consistent with the supremacy clause as applied by this Court in City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973)?

2. Does interstate commerce remain protected under the law of continuing nuisance?

PARTIES BELOW

The parties to the proceedings in the California Supreme Court from which review is sought are Petitioner Burbank-Glendale-Pasadena Airport Authority* and Respondents Mr. and Mrs. Kenneth L. Baker, Patrick J. Bigley, William & Jan Billos, Joe & Angie DeCasper, Charles & Janet Ludecke, Mr. and Mrs. Frank B. Miller, Sr., Thomas D. & Irene

---

*Petitioner Burbank-Glendale-Pasadena Airport Authority is a joint powers agency created by the cities of Burbank, Glendale and Pasadena pursuant to California Government Code §§ 6500 et seq. and 6546.1.

Pineiro, Gary & Gail Rainwater, John & Allison Rocks, Herb & Rose Rosen, Michael A. Rotella, Michael & Irma Taranto and Carl & Doris Waugh.

TABLE OF CONTENTS

Questions Presented for Review

Opinions Below 1

Jurisdiction 1

Statement of the Case 2

Argument 7

I

Continuing Nuisance Liability for Airports Is Consistent With the Supremacy Clause As Applied by This Court in City of Burbank v. Lockheed Air Terminal, Inc. 7

A. The Preemption of Nuisance Liability For Airports Was Not At Issue in the Courts Below 7

B. Federal Law Preserves a State's Ability to Compensate Victim's of Airport Nuisances 9

C. Supreme Court Precedent and Federal Case Law Supports Continuing Nui-

sance Liability for Airports 13

II

Interstate Commerce Remains Protected under the California Law of Continuing Nuisance 18

A. The Affect of Nuisance Liability on Interstate Commerce Was Never At Issue In the State Courts 18

B. Evenhanded, Legitimate, Local Action Is Constitutional, Unless Its Burden on Interstate Commerce Is Clearly Excessive 19

C. Continuing Nuisance Liability for Airports Imposes No Undue Burden On Interstate Commerce 20

Conclusion 29

Appendix: Petitioner's Second Supplemental Memorandum in Support of Demurrer to Amended Complaint A-1

TABLE OF AUTHORITIES CITED

Cases

City of Burbank v. Lockheed Air Terminal, Inc., 441 U.S. 624 (1973) 2,11,14

Cooley v. Board of Wardens of the Port of Philadelphia, 12 How. 249 (1851) 20

Greater Westchester Homeowners Assn. V. Los Angeles, 26 Cal. 3d 86, 603 P.2d 1329, 160 Cal.Rptr 733 (1979) cert. denied, 449 U.S. 820 (1980) 15,16,25

Griggs v. County of Allegheny, 369 U.S. 857 (1962) 13,16

H.P.Hood & Sons v. DuMond, 336 U.S. 525 (1949) 25

Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981) 20,22

Luedtke v. County of Milwaukee, 521 F. 2d 387 (7th Cir. 1975) 15,17

Phillips v. City of Pasadena, 27 Cal. 2d 104, 162 P.2d 625 (1945) 3

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 20,21,25,27

Pirolo v. City of Clearwater, 711 F.2d 1006, 1009 (11 Cir. 1983) 17

Rankin v. DeBare, 205 Cal. 639, 271 P.1050 (1928) 3

South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177 (1938) 23

Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) 20

Stiles v. Laird, 5 C. 120, 63 Am. Dec. 110 (1855) 10

Willson v. Black Bird Creek Marsh Co., 2 Pet. 245 (1829) 19

Statutes

Airline Deregulation Act of 1978, Pub. L. 95-504, § 105, 92 Stat.

1708, 49 U.S.C. § 1305 (West Supp. 1985) 11

California Code of Civil Procedure, Sec. 731 (West 1980) 10

California Code of Civil Procedure, Sec. 731(a) (West 1980) 13,24

California Government Code, Sec. 911.2 (West 1980) 3

California Government Code, Sec. 6546.1 (West 1980) 22

United States Code, Title 28, Sec. 1257(3) 1

Other

Brennan, State Court Decisions and the Supreme Court, 31 Penn. Bar Assn. Q. 393 (1960) 9,18

Congressional Record, Vol. 124, p. 37, 419 (1978) 12

No. 85-1101

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1985

Burbank-Glendale-Pasadena

Airport Authority,

Petitioner,

vs.

Kenneth L. Baker, et al.,

Respondents.

Respondents, Mr. and Mrs. Kenneth L. Baker, et al., respectfully request that the Petition for Writ of Certiorari be denied and that this Court let stand the decision of the Supreme Court of the State of California in Baker, et al., v. Burbank-Glendale-Pasadena Airport Authority.

OPINIONS BELOW

Under California law a nuisance may be treated as either "permanent" or "continuing". In reviewing the decisions below, the California Supreme Court held that a permanent nuisance is an "encroachment of a permanent nature erected upon one's lands", while a continuing nuisance is "a complaint made, not of the location of the offending structures, but of the continuing use of such structures". 39 Cal. 3d at 870. Furthermore, since the noise, fumes, and vibrations emanating from an airport are continuing in nature and subject to a proprietor's control, a plaintiff may elect to treat an airport as a continuing nuisance and sue for damages as they accrue.[1]

JURISDICTION

This case is not properly subject to the jurisdiction of this Court. Under 28 U.S.C. § 1257(3),

---

[1]The California Supreme Court also held that a public entity lacking the power of eminent domain may be sued for inverse condemnation. The entire opinion, along with the lower court decisions, is set out as an appendix to petitioner's brief.

review by certiorari is only appropriate when substantial federal questions have been raised at the state level. Contrary to petitioner's contention, no federal statutes were ever at issue and no question of possible effects upon interstate commerce was ever raised. Even the scope of this Court's decision in City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973), was only incidental to the California Supreme Court's decision.

STATEMENT OF THE CASE

Petitioner, the Burbank-Glendale-Pasadena Airport Authority, became a public entity in 1978. Respondents are homeowners who live in neighborhoods adjacent to the airport and who are subject to the unsettling effects of its aircraft. Petitioner airport began authorizing flights over respondents' homes in January of 1978. The flights have resulted in excessive noise, fumes, and vibration that are detrimental to respondents' hearing

and health and interfere with the peaceful enjoyment of their residences.

In 1982, the homeowners filed suit in the California Superior Court to recover for property damage and personal injury. They sought compensation under theories of both inverse condemnation and continuing nuisance. A continuing nuisance claim is not subject to the statute of limitations and demands payment only of damages suffered before the action was brought. Phillips v. City of Pasadena, 27 Cal. 2d 104, 107, 162 P.2d 625 (1945). On the contrary, a permanent nuisance claim must be filed within 100 days after the accrual of the cause of action and demands payment of all damages, past and future. See Cal. Gov't Code § 911.2; Rankin v. DeBare, 205 Cal. 639, 541,

271 P. 1050 (1928).[2] The homeowners sought to treat the nuisance as continuing and thereby skirt the issue of the statute of limitations.

In April of 1983, the Superior Court sustained a demurrer after finding that the nuisance was permanent and that the statute of limitations had run. It held that, under California Law, a permanent nuisance is one which is immune from judicial abatement. It then reasoned that, since an airport may not be enjoined by court order, it is a permanent nuisance. Thus respondents' claims were barred by the applicable statute of limitations.

The homeowners appealed their case to the

---

[2]Continuing nuisance is really more favorable to an airport since it assumes that the harm might abate in the future; whereas permanent nuisance compensates for all future damage speculatively. Ironically petitioners sought to be labeled a permanent nuisance so that the statute of limitations would bar respondents' claims.

California Court of Appeals. The Court of Appeals reversed the lower court's ruling and held that, under California law, a plaintiff may elect to treat a nuisance as continuing if it may be voluntarily abated. As a result, respondents could plead continuing nuisance and do so without fear of a statutory bar.

The California Supreme Court then affirmed the decision of the Court of Appeals but substituted its own version of the "permanent-continuing" distinction. The court stated that "permanent nuisances are of a type where, by one act, a permanent injury is done, and damages are assessed once for all". 39 Cal. 3d at 868. However, "if a nuisance is a use which may be discontinued at any time, it is considered continuing in nature". Id. at 869. Since airport operations could be altered so as to discontinue any harmful by-products, the airport could be classified as

continuing in nature.

The decisive issue in this case at all levels has been whether respondents could characterize the nuisance as permanent or continuing under California law. Never has it been questioned whether respondents' right to plead nuisance is unconstitutional. Nevertheless, petitioner, in an attempt to create a reviewable federal issue, has now belatedly questioned the propriety of nuisance actions against airports. Such an attempt clearly violates the well-established Supreme Court rule that issues brought for review must have been raised in the state courts. See Brennan, State Court Decisions and the Supreme Court, 31 Penn. Barr Assn. Q. 393, 399-400 (1960).

ARGUMENT

I

CONTINUING NUISANCE LIABILITY FOR AIRPORTS IS CONSISTENT WITH THE SUPREMACY CLAUSE AS APPLIED BY THIS COURT IN CITY OF BURBANK V. LOCKHEED AIR TERMINAL, INC.

A. The Preemption of Nuisance Liability for Airport was not At Issue in the Courts Below.

Despite the limited holding in this case, petitioner now seeks to obtain review in this Court by creating a question of federal preemption. In fact, petitioner has never before argued that state nuisance actions are preempted by federal law. What it did argue is that, because of the federal preemption of the control of airports, its

operations should be classified as a permanent nuisance. Any argument about total preemption was unnecessary since petitioner hoped to characterize its nuisance as permanent and thus barred by the statute of limitations. Because that attempt failed, petitioner now requests review on the grounds that nuisance liability violates the supremacy clause of the Constitution.

The California Supreme Court's holding hardly raises a question of the preemption of state nuisance actions for airport noise. The posture of the case on demurrer lent itself only to the question of the characterization of the nuisance. Any discussion by the California court of the preemption of such actions must be viewed as dictum since petitioner had already conceded the constituion-

ality of nuisance actions at the trial level.[3] Were this Court now to preempt such actions, petitioner would return victor in a legal battle never entertained at the state level. Petitioner should not now be allowed to raise this novel argument in a last-ditch effort to absolve itself of responsibility for harm done to neighboring residences. See Brennan, State Court Decisions and the Supreme Court, 31 Penn. Bar Assn. Q. 343, 399-400 (1960).

B. Federal Law Preserves a State's Ability to Compensate Victims of Airport Nuisances

---

[3] In demurring on statute of limitations grounds petitioner stated that plaintiffs "had a statutory nuisance remedy which they lost because they failed to act reasonably promptly after determining that airport operations unreasonably interferred with the use and enjoyment of their property". See Appendix. A-11.

State nuisance actions have long been recognized at common law and by statute. See Stiles v. Laird, 5 c. 120, 63 Am. Dec. 110 (1855). More specifically, in California, a nuisance cause of action became codified as early as 1851. Cal. Civ. Proc. Code § 731 (West 1980). The purpose of nuisance law is to protect the health and senses of a state's citizens and preserve the peaceful enjoyment of their land. Id. Of course, with the advent of airflight and urbanization, the goal of nuisance law becomes more difficult to achieve. The competing interests of modern air flight and urban living meet head on as airports and cities become more concentrated. Despite these developments, Congress has never intimated that the national system of air transportation is immune from private nuisance suits.

In 1973, this Court established that federal regulation of aviation is so pervasive that it

leaves no room for local regulation. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973). However, this Court reserved the question of an airport proprietor's right to adopt its own noise control measures. Id. at 635, n. 14. Subsequently, Congress answered this question and gave proprietors the authority to do so. Airline Deregulation Act of 1978, Pub. L. 95-504, § 105, 92 Stat. 1708, 49 U.S.C. § 1305. In passing the Airline Deregulation Act of 1978, Congress stated in section 105(b)(1):

> "Nothing in . . . this section shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by any air carrier certificated by the Board to exercise its proprietory powers and rights."

Id. In commenting on this section, the Chairperson of the Senate Commerce Committee said that "it was not the intent of the Senate conferees to limit in any way the normal exercise of the

existing proprietors' powers to place nondiscriminatory restrictions on the operations at an airport, subject to Constitutional and statutory limitations". 124 Cong. Rec. 37, 419 (1978) (statement of Sen. Cannon). Hence, Congress has expressly granted airport proprietors authority over noise control measures. Since this authority is not preempted, liability for the detrimental use of this authority should not be preempted either. A public entity should be responsible for those acts over which it has control.

Furthermore, nuisance actions for airport noise, fumes, and vibration are not novel and certainly not unknown to Congress. Yet, in the wake of this Court's City of Burbank decision, Congress saw fit to maintain the status quo and made no attempt to bar state damage remedies for the harmful effects of jet flights over residential neighborhoods. In contrast, California law-

makers had passed legislation as early as 1859 which made it more difficult to obtain damages for the harmful effects of airports. Cal. Civ. Proc. Code § 731(a) (West 1980). Congress has made no similar move. Nevertheless, petitioner now asks this Court to legislate in behalf of Congress what Congress refrained to do itself.

C. Supreme Court Precedent and Federal Case Law Support Continuing Nuisance Liability for Airports.

More than twenty years ago, this Court upheld the propriety of liability for intrusive airflights over residential areas. See Griggs v. County of Allegheny, 369 U.S. 84 (1962). In the Griggs case, the plaintiff sought damages for jet flights that originated and touched down at a nearby county airport. This Court upheld that plaintiff's right to sue the county for damages.

Similarly, in the case at bar, respondent homeowners are also seeking damages for the harm caused by passing aircraft. Unlike the Griggs' plaintiff, however, respondents not only seek compensation for the air easement over their homes, but also seek damages for the interference with their health and peaceful home life. Nevertheless, this difference in damages sought should be of no Constitutional moment. If suits for property damages are consistent with the supremacy clause, then suits for personal injury damages are no less consistent. Only local regulation of airports is preempted by Supreme Court precedent, not local damage actions. See City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973).

Moreover, the right to sue in state court for an airport nuisance is not unfamiliar to this Court. In 1980, this Court denied certiorari in

a case where nuisance liability was imposed on an airport at the State level. Greater Westchester Homeowners Assn. v. Los Angeles, 26 Cal. 3d. 86, 603 P.2d 1329, 160 Cal. Rptr. 733 (1979), cert. denied, 449 U.S. 820 (1980). In addition, the only federal court to entertain such a suit has recognized a state cause of action. In Luedtke v. County of Milwaukee, 521 F 2d 387 (7th Cir. 1975), the Seventh Circuit held that an airport proprietor could be liable for a state law nuisance if the airport failed to comply with federal regulations. The California Supreme Court's decision below is consistent with this holding. An airport proprietor would be liable in California only for those operations not preempted by federal control. Not only did the California Supreme Court recognize "that federal law precludes interference with commercial flight patterns and schedules", 39 Cal. 3d at 872, but past California precedent confines liability to

operations over which an airport has "substantial proprietary control". Greater Westchester Home-Owners Assn., 26 Cal. 3d at 97.

Furthermore, liability for nuisance will in no way harm the preemptive wall built around air flight by City of Burbank. On the contrary, airports will remain free from local regulation and the only decisions affected will be those subject to local proprietary control. Even proprietary decisions will not be the subject of direct local regulation. Such decisions will be no more controlled by private nuisance suits than they are by suits in inverse condemnation -- yet the latter are decidedly Constitutional. See Griggs v. County of Allegheny, 369 U.S. 84 (1962). Indeed, the "just compensation" requirement has never kept local or federal government from taking land; it only keeps them honest when they do so. Likewise, under nuisance law, an airport

remains free to control air traffic patterns, operational procedures, or curfews. Only when it abuses its power must it answer to the law of nuisance by way of damages. Hence, a nuisance cause of action will preserve responsible decision making by local entities and prevent the lawless abuse of their power.

Finally, by declaring state nuisance suits preempted, this Court would raise airport nuisance to a federal cause of action cognizable only in the federal courts. This seems a strange result when petitioner readily accepted the jurisdiction of the California courts. Petitioner could thereby accomplish indirectly at the highest level what it failed to do at the pleading stage. Current federal case law recognizes no such exclusive jurisdiction. See Luedtke v. County of Milwaukee, 521 F. 2d 387 (7th Cir. 1975); Pirolo v. City of Clearwater, 711 F. 2d 1006, 1009 (11 Cir. 1983).

II

INTERSTATE COMMERCE REMAINS PROTECTED UNDER THE CALIFORNIA LAW OF CONTINUING NUISANCE

A. The Affect of Nuisance Liability on Interstate Commerce was Never At Issue in the State Courts.

As with the question of federal preemption, the interstate commerce clause was never raised as a defense in the state courts. Petitioner proffers it now as an attempt to gain this Court's ear; yet, it is well established that issues brought for review by certiorari must necessarily have been argued in the lower courts. Brennan, State Court Decisions and the Supreme Court, 31 Penn Bar Assn. Q. 393, 399-400 (1960). Otherwise, issues are denied the ripening of a full season of lower court debate. Moreover the state judiciary risk reversal without ever having ruled

on the matter. For these reasons, a debate over the scope of the interstate commerce clause should not be entertained for the first time on review.

B. Evenhanded, Legitimate, Local Action is Constitutional Unless its Burden on Interstate Commerce is clearly Excessive

During the period since the Constitutional Framers first vested the federal government with the power to regulate interstate commerce, this Court has kept a careful vigil to protect this power from usurpation by parochial state interests. As early as 1829, Chief Justice Marshall reviewed the effect of state action upon interstate commerce. Willson v. Black Bird Creek Marsh Co., 2 Pet. 245 (1829). Since then, a considerable body of case law has evolved dealing with the power of a state to affect interstate commerce in the absence of federal regulation. See e.g.

Kassell v. Consolidated Freightways Corp., 450 U.S. 662 (1981) (state interest weighted against interference with interstate commerce); Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) (relative weights of state and national interests are measured); Cooley v. Board of Wardens of the Port of Philadelphia, 12 How. 299 (1851) (states may not regulate interests requiring national uniformity.

The modern approach to testing the Constitutionality of state laws affecting interstate commerce is to balance the competing federal and state interests. This approach was succinctly outlined in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). In rephrasing the accepted test, Justice Stewart stated for a unanimous Court:

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be

> upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. (citation) If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

397 U.S. at 142. Therefore, a law that is decidedly local, legitimate and evenhanded will pass constitutional muster unless interstate commerce is excessively burdened.

C. State Nuisance Liability for Airports Imposes no Undue Burden on Interstate Commerce.

The constitutionality of a law affecting interstate commerce is tested by first determining if the state's action is of local concern, legitimate purpose, and evenhanded application. Pike 397 U.S. at 142. Private nuisance liability for airports

meets all of these tests. In the case at bar, respondent homeowners have sought recovery for the airport's interference with their health and home life. The constant stream of airflights with their noxious side effects are certainly of local concern. In fact, the local law which created the airport authority also charged it to "diligently pursue all reasonable avenues available to insure that adverse effects of noise are being mitigated". Cal. Gov't Code § 6546.1 (West 1980).

Moreover, the protection of health and safety has always been considered a legitimate state goal. In fact, "'if safety justifications are not illusory, the court will not second guess legislative judgment about their importance in comparison with related burdens on interstate commerce.' (citation). Those who would challenge such bona fide safety regulations must overcome a 'strong presumption of validity'." Kassell v. Consolidated Freightways Corp.,

450 U.S. 662, 670 (1981). Airport nuisance liability is just such a bona fide measure since its goal is to compensate local residents for the harmful effects of unnecessary nuisances.

In addition to being of local concern and having a legitimate purpose, nuisance liability also operates evenhandedly. Evenhandedness requires that the burdens of state action not fall entirely on those outside of the state -- burdens must be shouldered evenhandedly by both those without and those within a state. The evil this requirement seeks to avoid is aptly stated by Justice Stone in South Carolina State Highway Department v. Barnwell Bros., 303 U.S. 177, 185 n.2 (1938):

> "(W)hen the regulation is of such character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the (state)."

State nuisance liability for airports avoids this pitfall since the burden of such liability falls substantially on local airport proprietors as well as local airlines. Their combined political voice was avilable to insure that local lawmakers considered the effect of nuisance liability on air transportation.

After determining that state action is of local concern, legitimate purpose, and evenhanded application, a court must determine the extent of the burden placed upon interstate commerce. The California scheme in question is so narrowly drawn that the burden on interstate commerce is slight. Under California law a plaintiff must show that a defendant employes "unnecessary and injurious methods of operation" in order for an airport to be deemed a nuisance. Cal. Civ. Proc. Code § 73(a) (West 1980). This makes it difficult to show that an airport has indeed created

a nuisance. In addition, California law would only hold an airport proprietor liable for decisions over which it has control. This precludes any interference with the federally-regulated aspects of air transportation. See Greater Westchester Homeowners Assn. v. Los Angeles, 26 Cal. 3d 86, 603 P.2d 1329 (1979) cert. denied, 449 U.S. 820 (1980). By implication, Congress left certain decisions to the parochial control of local airport proprietors because they assumed such control would not unduly burden interstate commerce. Based on that assumption, holding proprietors liable for those decisions will not have the uniformity of national air transportation.

In determining whether the burden that a scheme places on interstate commerce is "clearly excessive", a court must look at the "nature of the local interest involved". Pike v. Bruce

Church, Inc., 397 U.S. at 142. In this case, respondents desire compensation for damages to their health, property, and tranquility. Such health and safety measures are schemes which this "Court has been most reluctant to invalidate." Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 670 (1981). In sharp contrast, local laws aimed at economic protectionism are rarely upheld. This deference to health and safety measures was noted by Justice Jackson in U.P. Hood & Sons v. DuMond, 336 U.S. 525, 533-35 (1949):

> "(The) distinction between the power of the state to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law. . . . This court has consistently rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the

> state, while generally supporting their right to impose even burdensome regulations in the interest of local health and safety.

Therefore, nuisance liability, as an attempt to protect those subject to the harmful effects of airport noise, smoke, and vibration, is a valid state measure worthy of great deference.

Finally, an otherwise constitutional scheme will be upheld if no alternative scheme exists that would have a "lesser impact on interstate activities". Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). In the case at bar, no such alternative scheme exists. The only other means available to compensate homeowners is through an action in inverse condemnation. However, inverse condemnation is no less burdensome on interstate commerce. While nuisance liability requires only the payment of accrued damages, inverse condemnation requires payment

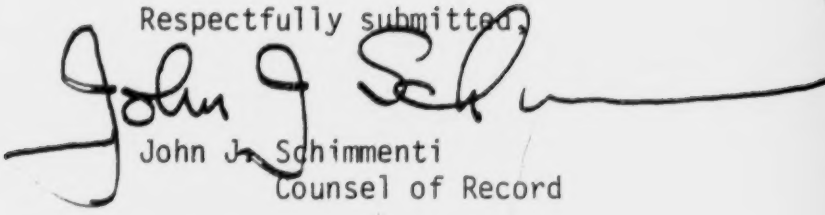
of all damages, past and future -- a highly speculative award. Hence, under inverse condemnation, an airport would be liable for damages it might never create. As a result, airport nuisance liability is the least restrictive means available to compensate the victims of unnecessary noise, fumes, and vibration.

CONCLUSION

The California Supreme Court in Baker v. Burbank-Glendale-Pasadena Airport Authority interpreted California nuisance law in a manner consistent with this Court's past precedents and federal law. Because issues of constitutional dimension were never raised below, and because the decision below nevertheless conforms with constitutional standards, respondents respectfully oppose the Petition for Writ of Certiorari

and ask that it be denied.

Respectfully submitted,



John J. Schimmenti
Counsel of Record

Schimmenti, Mullins &
Berberian

Attorneys for Respondents

APPENDIX A

APPENDIX

Petitioner's Second Supplemental Memorandum in Support of Demurrer to Amended Complaint

Defendant Burbank-Glendale-Pasadena Airport Authority (the "Airport") respectfully submits the following Supplemental Memorandum in Support of Demurrer to Amended Complaint.

I. Preparatory Statement

The crucial question in termining the viability of the Airport's demurrer to plaintiffs' inverse condemnation cause of action is whether California Government Code Section 6546.1 prohibits the Airport from condemning avigation easements over plaintiffs' properties. The Court has asked the parties to submit briefs analyzing the legislative history of Section 6546.1 and to focus, in particular, on the amemdment to that Section adopted in 1978 by the passage of S.B.

1364.

As the record of S.B. 1364 demonstrates, the Legislature carefully considered the language utilized to limit the Airport's eminent domain power. A Legislative Counsel's opinion was solicited and obtained as to the meaning of the phrase "fee title" in the final version of the bill. As the following analysis demonstrates, the facts compel the conclusion that, as amended in 1978, Section 6546.1 restricts the Airport from condemning easements.

II

The Legislature was aware that "Fee Title" Included Title to Easements

As we noted previously, the portion of Government Code Section 6546.1 (hereinafter "Section 6546.1") which prohibits the purchase of fee title to condemned real property was added by S.B. 1364 on March 24, 1978. During considera-

of the amendment to Section 6546.1, State Senator Newton R. Russell, the author of S.B. 1364, requested the Legislative Counsel's Office to advise the Legislature concerning the effect of a proposal to add the words "fee title" to the bill. Senator Russell's request is attached as Exhibit "A" to the Declaration of Kay Lentz filed concurrently herewith. The Legislative Counsel's opinion is attached thereto as Exhibit "B".

In interpreting the phrase "fee title", the opinion of Legislative Counsel principally relies upon Civil Code Section 762. That Section and the Legislature Counsel opinion define a "fee" as every estate of inheritance. "Fee title" was defined by Legislative Counsel as "the property or fee which is inheritable. . ." (Emphasis added). The Legislature was, therefore, fully aware of the broad scope of the term "fee title", under California law. Indeed, the case

law is clear that the definition of "fee" in Civil Code Section 652 has always included easements which are transferable or inheritable. See Gerhard v. Stephens, 68 Cal.2d 85, 884-85 (1968); Johnson v. Ocean Shore Railroad Co., 16 Cal.App.3d 429, 434-35 (1971). See also, Red Bluff Developers v. County of Tehama, 258 Cal. App.2d 668, 671-72 (1968).

The specific question in Gerhard was whether a profit a prendre could be lost by abandonment notwithstanding the rule that legal title to a fee simple could never be abandoned. Gerhard acknowledged that the common law applied identical principles to both easements and profits. Gerhard outlined those principles and they are the rules which control the meaning of the language used by the Legislature in this case.

The California Supreme Court held, in Gerhard, that an easement is an estate in real property; if the easement is unlimited in duration,

it is a freehold interest, an estate in fee, and real property. Moreover, this estate in real property is necessarily granted and held separate and apart from the surface title. It is a valuable interest which may be transferred or inherited. 68 Cal.2d at 877-81. The Court in Gerhard summarized these attributes:

> "'(T)he interest in land which an easement constitutes is real property and itself may be held in fee simple . . . .' (Highland Realty Co. v. City of San Rafael (1956), 46 Cal.2d 669, 677 fn. 1 (298 P.2d 15); Appeal of North Beach & M.R.R. Co., supra, 32 Cal. 499, 509; City of Glendora v. Faus (1957), 148 Cal.App.2d 920, 291 (307 P.2d 976); Ocean Shore R.R. Co. v. Doelger (1954), 127 Cal.App.2d 392, 398-399 (274 P.2d 23); Irvin v. Petitfils (1941), 44 Cal.App.2d 496, 500 (112 P.2d 688); Eastman v. Piper 91924), 68 Cal.App.2d 554, 562 (299 P. 1002); 17 Cal. Jur. 2d Easements, §2 pp. 90-91). 68 Cal.2d at 881.

The Court in Gerhard specifically refered to Civil Code Section 762, citing that Section for the proposition that the word "fee" refers to any estate of inheritance as opposed to a description of the possessory rights of surface

ownership. 68 Cal. 2d at 884-85. Indeed, the Court traced the attribute of inheritability of an easement as far back as Blackstone's Commentaries. 68 Cal.2d at 885.

Given this context, it is manifest that the Legislature's choice of the words "fee title" in S.B. 1364 was not a case of poor draftsmanship or inadvertence. The extent of the limitation of the Airport's power to condemn was the subject of focused inquiry resulting first in the proposed addition of the phrase "fee title" to Section 6546.1, and ultimately, in a Legislative Counsel's opinion. The scope of the term fee title was was therefore known to the Legislature to include easements and it must be so construed to effectuate the legislative intent. This construction is not only compelled by the legal analysis conducted by the legislators but, as demonstrated below, is essential to the proper operation of Section 6546.1.

III

The Prohibition against Acquisition of Air Easements is Consistent with the Legislature's Purpose in Enacting Section 6546.1.

As detailed in the Airport's Supplemental Brief filed on January 12, 1983, Title 21 of the California Administrative Code defines a "Noise Impact Area" as the sum, in square statute miles, of all "Incompatible Land Uses" within the "Noise Impact Boundary". Chief among incompatible land uses is residential property, and the law requires that all such incompatible uses be eliminated from within the noise impact boundary.

Attached hereto as Exhibit "A" is a conceptual sketch that appears in the California Administrative Code which demonstrates these concepts as they apply to a hypothetical airport. The sketch identifies by cross-hatching those areas within

the noise impact boundary which are incompatible (i.e., residential) and which must be eliminated. This is the "noise impact area". In terms of this sketch, the law requires that all cross-hatched areas be eliminated. There are at least three ways for the hypothetical airport depicted in Exhibit "A" to accomplish this legislative mandate.

The first would be to operate the airport such that the noise impact boundary would shrink to encompass only the area shown as zoned for airport, industrial or commercial uses. Such a result is patently unlikely absent the elimination of all jet aircraft or similarly drastic operational modifications. A second alternative potentially available to an airport would be the conversion of residential communities by the condemnation and purchase of all residential areas within the existing boundary. There is no dispute that this alternative is unavilable to the

Burbank-Glendale-Pasadena Airport by virtue of Section 6546.1. A third alternative is the condemnation and purchase of air easements over the cross-hatched areas. This alternative is generally available because Title 21 defines property subject to an avigation easement, including residential property, as a compatible land use. As a compatible land use, such property is not included in the calculation of the noise impact area.

As originally enacted in 1976, Section 6546.1 prohibited activities which resulted in an increase in the size of the noise impact area based on a community noise equivalent level of 70 decibels. It did not and does not now prohibit an increase in the size of the noise impact boundary. Therefore, if the facilities had been sold to the Airport Authority prior to the 1978 amendment, the Airport would have had the authority to condemn avigation easements over

residentially zoned property and thereby eliminate all existing incompatible land uses within the noise impact boundary. Indeed, under the pre-1978 Section, the Airport could actually increase the size of the boundary, as long as it condemned sufficient avigation easements.

The Legislature was willing to support the transfer of the Airport from Lockheed Air Terminal, Inc. only on the condition that such a transfer would not increase the adverse effects of noise on the surrounding community or result in an expansion of airport operations. The 1978 amendment to Section 6546.1 ensures that result by prohibiting the Airport from complying with Title 21 through the use of the power of condemnation. Prior to that amendment, the Airport could have complied with the letter but not the intent of Section 6546.1. Thus the Legislature must be considered to have intended to prohibit the Airport from condemning easements in resi-

dential property.

Plaintiffs have suggested that the prohibition against condemnation deprives them of a vested remedy. In passing Section 6546.1, however, it was never the intent of the Legislature to give plaintiffs a new remedy. Plaintiffs, who presumably reside near to or within the Airport's noise impact area, had a statutory nuisance remedy which they lost because they failed to act reasonably promptly after determining that airport operations unreasonably interfered with the use and enjoyment of their property. The Legislature had no constitutional duty to afford these plaintiffs a new remedy merely because the Airport was transferred from a private entity to public ownership.

Plaintiffs never had an inverse condemnation remedy against Lockheed Air Terminal, Inc., the Airport's predecessor. That is the holding of Abacherle. Therefore, when the facilities were

transferred to the Airport, plaintiffs lost nothing. There is simply no legal basis to the assertion that the Legislature's restriction upon the ability to condemn property somehow worked a forfeiture of their rights amounting to an ex post facto application of the law. The statute can and does operate only in a prospective manner.

IV

Conclusion

The Legislature added the term "fee title" to Section 6546.1 knowing that the term encompassed any rights in real property subject to ownership in fee including an easement. This was a considered decision by the Legislature intended to aid in managing the noise problem at the Airport. In essence Section 6546.1 is a legislative directive to the Airport to operate the facilities in such a manner as to reduce the impact of noise. It is beyond doubt that the

Legislature did not wish the Airport to achieve compliance with this mandate by purchasing avigation easements. As it is thus barred by statute from condemning such easements, the Airport cannot, as a matter of law, be liable in inverse condemnation for failing to exercise a power it lacks. The demurrer to the First Cause of Action in the Amended Complaint is well taken and should be sustained. The demurrer to the Second Cause of Action having previously been sustained, judgment in favor of the defendant should be entered.

Kadison, Pfaelzer, Woodard,

Quinn & Rossi
Richard K. Simon
Michael C. Kelley
James I Ham

by MICHAEL C. KELLEY
Attorneys for Defendant
Burbank-Glendale-Pasadena
Airport Authority

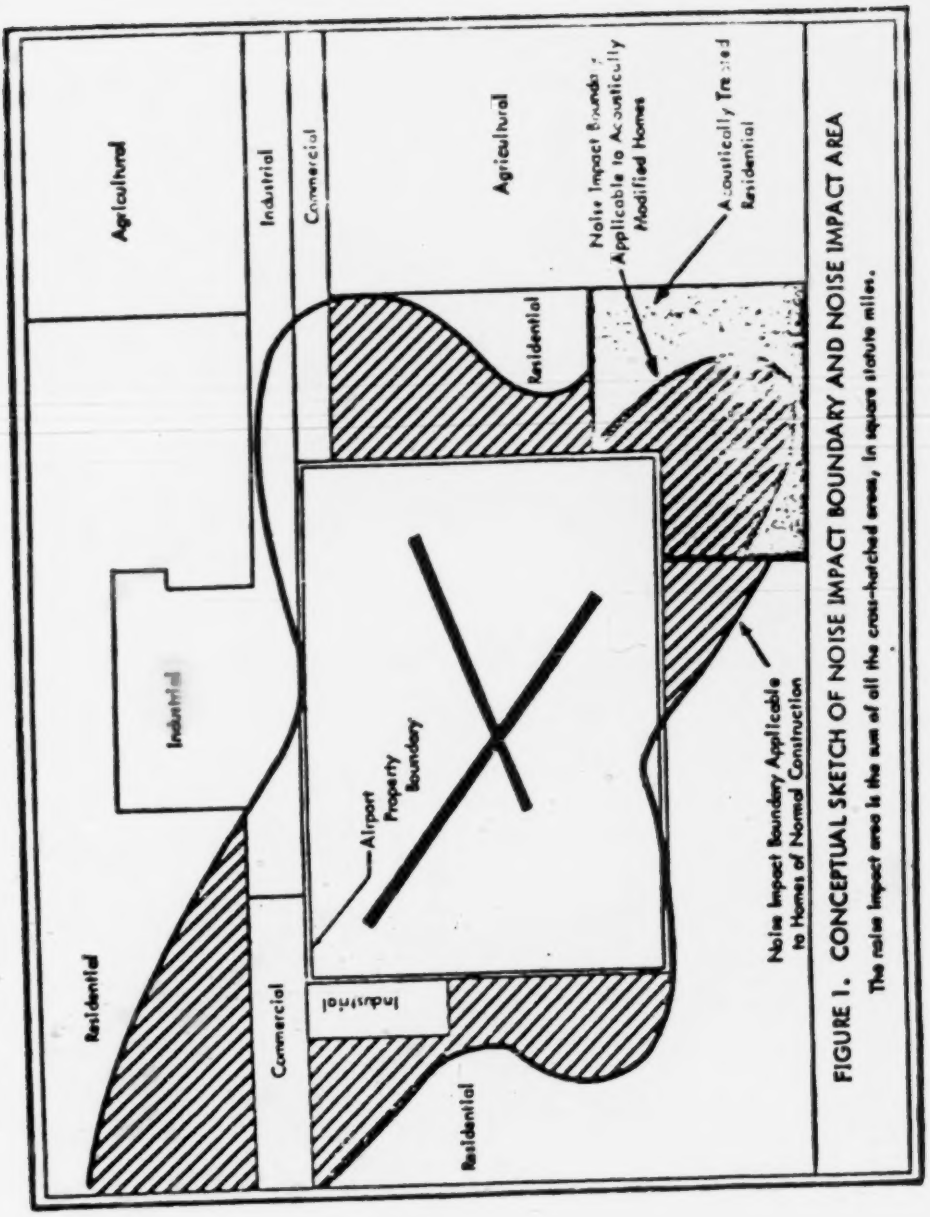

Agricultural
Industrial
Commercial
Agricultural
Noise Impact Boundary Applicable to Acoustically Modified Homes
Acoustically Treated Residential
Residential
Airport Property Boundary
Noise Impact Boundary Applicable to Homes of Normal Construction
Residential
Industrial
Commercial
Residential
FIGURE 1. CONCEPTUAL SKETCH OF NOISE IMPACT BOUNDARY AND NOISE IMPACT AREA
The noise impact area is the sum of all the cross-hatched areas, in square statute miles.

FIGURE 1. CONCEPTUAL SKETCH OF NOISE IMPACT BOUNDARY AND NOISE IMPACT AREA

EXHIBIT "A"

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 3550 Wilshire Boulevard, Suite 916, Los Angeles, California. On this date, January 22, 1986, I served the within RESPONDENTS' BRIEF IN OPPOSITION in re: "Burbank-Glendale-Pasadena Airport Authority vs. Kenneth L. Baker, et al." in the United States Supreme Court, October Term, 1985, No. 85-1101.

on the persons interested in said action by placing 3 true copies thereof enclosed in sealed envelopes with first class postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

MICHAEL C. KELLEY
KADISON, PFAELZER, WOODARD,
QUINN & ROSSI
Fortieth Floor
707 Wilshire Blvd.
Los Angeles, CA 90017

All parties required to be served have been served.

I certify (or declare) under penalty of perjury that the foregoing is true and correct.
Executed on January 22, 1986
at Los Angeles, California.

Kathleen Kabakack